Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-24(31)-1579-87
LIM BENG CHOON J
16 MARCH 1990

Equity — Assignment — Sale and purchase agreement in respect of property — Purchaser obtaining loan from bank — Rights and benefits accruing to purchaser of property assigned to bank as security — Whether assignment absolute or by way of charge — Civil Law Act 1956, s 4(3)

Equity — Competing equities — Priority — Notice of equity — Whether right of equity-holder defeated by notice of earlier equity

Land Law — Caveat — Effect of — Whether enlarges rights of caveator in respect of property

The defendant had entered into an agreement with a company to purchase from it a parcel in a building. At all material times, the building had not yet been sub-divided and no subsidiary document of title had been issued in respect of the parcel. The defendant obtained a loan from the plaintiff bank to assist in the purchase of the parcel, and as security for the loan, he executed a deed of assignment by which he agreed to assign the full and entire benefit of the agreement to the plaintiff. The deed provided, inter alia, that the defendant was to execute and deliver to the plaintiff an instrument of charge in escrow in respect of the parcel to be brought into effect upon the issue of a subsidiary document of title in respect of the parcel. It was also provided in the deed that the defendant was not to transfer, charge or otherwise howsoever deal with the parcel or any interest of the defendant therein without the prior consent of the plaintiff.

Following the default by the defendant in repaying the loan, the plaintiff applied to the court for an order for a declaration that they were the assignee of the parcel and an order that the assignment be enforced by sale by auction of the parcel. The defendant failed to appear to the action and the court made an order in terms of the application in default.

Before the auction could be held, the intervenor applied for an order, inter alia, to intervene in the action. It transpired that some time after the creation of the assignment in favour of the plaintiff, without the knowledge or consent of the plaintiff, the defendant had entered into an agreement with the intervenor by which he had purported to sell the parcel to the intervenor. The defendant had also executed a deed of assignment in favour of the intervenor of his rights and interests under the sale and purchase agreement with the company. The intervenor had caused to be entered a caveat in respect of the land over which the parcel was erected.

It was contended for the intervenor that the assignment in favour of the plaintiff was not an absolute one and was, at most, an equitable one. It was conceded that the assignment in favour of the intervenor which was purportedly granted by the agreement between the defendant and the intervenor was likewise an equitable one. However, it was contended for the intervenor that as the intervenor had entered a private caveat in respect of the land concerned but the plaintiff had not done so, the equitable right of the intervenor must be superior to that of the plaintiff. It was also argued for the intervenor that as the assignment in favour of the plaintiff provided for the contemporaneous execution of an instrument of charge, it must follow that the assignment was not an absolute assignment but an assignment by way of a charge.

Held, granting judgment for the plaintiff :

(1) The assignment by the defendant in favour of the plaintiff was an absolute assignment. In the first place, the defendant had agreed to assign all his benefits, estate, interest or right whatsoever in the parcel to the plaintiff. The defendant was holding the same in trust for the plaintiff but only as a bare trustee since he had assigned all his rights to the plaintiff. In the second place, the defendant as assignor had agreed to allow the plaintiff, in the event of default committed by him under the assignment in favour of the plaintiff, to take possession of the parcel as well as the right and power to sell and assign the same as the 'absolute unencumbered owner thereof.'

(2) The provision in the assignment in favour of the plaintiff for the execution of an instrument of charge presumably in escrow did not render the assignment an assignment by way of charge. It merely provided an additional safeguard which was necessary because at the time when the said assignment was made the defendant had not been granted any registrable title under the Strata Titles Act 1985.

(3) At law, as in equity, the basic rule is that rights and interests primarily rank in order of creation. An important qualification to the basic rule is the doctrine of the purchaser without notice. A subsequent purchaser is affected by notice of an equity when there is actual, constructive or imputed notice on his part. In this case, the intervenor had had actual notice of the assignment in favour of the plaintiff as manifested in the fifth recital of the agreement between the defendant and the intervenor. What was more important was that by the said agreement the intervenor had covenanted that should the defendant fail to pay the plaintiff on or before 31 January 1984 such sums of money as shall be sufficient to redeem the parcel, the intervenor was to pay the same to the plaintiff and may thereafter recover the same from the defendant as a debt due and owing by the defendant. It was manifestly clear that the plaintiff had an equity which was better than that of the intervenor.

(4) The entry of a private caveat does not necessarily mean that the caveator has a better priority against another who has not as yet lodged one. The effect of a caveat is not to enlarge or add to the existing proprietory rights of the caveator, if he has any.

[Bahasa Malaysia summary

Defendan telah memasuki satu perjanjian dengan sebuah syarikat untuk membeli daripadanya satu parcel dalam sebuah bangunan. Pada semua masa material, bangunan itu belum lagi dipecah lot dan tidak ada dokumen hakmilik subsidiari dikeluarkan berkenaan dengan parcel tersebut. Defendan memperolehi satu pinjaman daripada bank plaintif untuk menolongnya dalam membeli parcel itu, dan sebagai jaminan untuk pinjaman itu, dia menandatangani suatu suratikatan penyerahhakan di mana dia telah berjanji menyerahhak seluruh dan kesemua faedah perjanjian itu kepada plaintif. Suratikatan memperuntukkan, antara lainnya, bahawa defendan perlu menandatangani dan menyerah kepada plaintif satu suratcara gadaian dalam eksrow berkenaan dengan parcel itu supaya dibawa menjadi berkesan apabila dokumen hakmilik subsidiari berkenaan parcel itu dikeluarkan. Ia juga memperuntukkan dalam suratikatan tersebut bahawa defendan tidak boleh memindahmilik, gadai atau dengan lain kaedah atau apa carapun berurusniaga dengan parcel itu atau sebarang

kepentingan defendan di dalamnya, tanpa perseutjuan terdahulu daripada plaintif.

Berikutan dengan keingkaran defendan dalam membayar kembali pinjaman, plaintif memohon kepada mahkamah bagi satu perintah untuk deklarasi bahawa mereka adalah pemegang serahhak parcel itu dan satu perintah bahawa penyerahhakan dikuatkuasa dengan penjualan melalui lelong awam parcel itu. Defendan telah gagal menghadiri tindakan ini dan mahkamah membuat perintah seperti dipohon dalam permohonan secara ingkar. Sebelum lelong awam boleh dikendalikan, pencelah memohon bagi satu perintah, antara lainnya, untuk mencelah dalam tindakan ini. Adalah diketahui bahawa beberapa masa selepas penwujudan penyerahhakan dalam faedah plaintif, tanpa pengetahuan atau persetujuan plaintif, defendan telah memasuki satu perjanjian dengan pencelah di mana dia dikatakan menjual parcel tersebut kepada pencelah. Defendan juga telah menandatangani satu suratikatan penyerahhakan dalam faedah pencelah hak-hak dan kepentingannya di bawah perjanjian jual-beli dengan syarikat itu. Pencelah telah menyebabkan satu kaveat dimasukkan terhadap tanah di mana parcel itu didirikan di atasnya.

Adalah dihujahkan bagi pencelah bahawa penyerahhakan dalam faedah plaintif bukanlah satu yang mutlak dan adalah, selebih-lebihnya satu yang ekuiti sahaja. Adalah dipersetujui bahawa penyerahhakan dalam faedah pencelah yang dikatakan diberi oleh perjanjian antara defendan dan pencelah adalah juga satu ekuiti. Akan tetapi, ia dihujah bagi pencelah bahawa oleh kerana pencelah telah memasukkan satu kaveat persendirian terhadap tanah yang berkenaan tetapi plaintif tidak berbuat demikian, hak ekuiti pencelah patutlah lebih atasan daripada yang ada pada plaintif. Adalah juga dihujah bagi pencelah bahawa oleh kerana penyerahhakan dalam faedah plaintif memperuntukkan bagi penyempurnaan suratcara gadaian pada masa yang sama, ia mesti bermakna bahawa pennyerahhakan bukanlah satu penyerahhakan yang mutlak tetapi satu penyerahhakan melalui satu gadaian.

Keputusan, memberi penghakiman bagi plaintif:

(1) Penyerahhakan oleh defendan dalam faedah plaintif adalah satu penyerahhakan yang mutlak. Pertamanya, defendan telah bersetuju menyerahhak kesemua faedah, estet, kepentingan atau haknya dalam parcel itu kepada plaintif. Defendan sedang memegangnya dalam amanah bagi plaintif tetapi hanya sebagai satu 'bare trustee' kerana ia telah menyerahhak semua haknya kepada plaintif. Keduanya, defendan sebagai penyerahhak telah bersetuju membenarkan plaintif, jika keingkaran dilakukan olehnya di bawah penyerahhakan dalam faedah plaintif, untuk mengambil milikan parcel berserta hak dan kuasa untuk menjual dan menyerahhaknya sebagai tuanpunya mutlak tanpa bebanan.

(2) Peruntukkan dalam penyerahhakan sesuatu suratcara gadaian dalam eksrow tidak menjadikan penyerahhakan satu penyerahhakan dengan cara gadaian. Ia hanya memperuntukkan satu perlindungan tambahan yang diperlukan kerana pada masa penyerahhakan itu dibuat, defendan masih tidak diberi sebarang hakmilik yang boleh didaftar di bawah Akta Hakmilik Strata 1985.

(3) Di sisi undang-undang, seperti dalam ekuiti, kaedah asas ialah hak-hak dan kepentingan-kepentingan pada asasnya berkedudukan mengikut aturan penwujudannya. Satu kecualian yang penting kepada kaedah asas ialah doktrin pembeli tanpa notis. Seorang pembeli terkemudian akan tersentuh oleh notis satu ekuiti bila kerkaitan pada pihaknya. Dalam kes ini, pencelah mempunyai notis sebenar mengenai penyerahhakan dalam faedah plaintif seperti yang dimanifes dalam vesital kelima perjanjian antara defendan dan pencelah. Apa yang lebih penting adalah melalui perjanjian tersebut, pencelah telah berjanji bahawa sekiranya defendan gagal membayar plaintif pada atau sebelum 31 Januari 1984, wang tersebut yang secukupnya untuk menebus parcel itu, pencelah akan membayarnya kepada plaintif dan boleh kemudiannya mendapatnya kembali daripada defendan sebagai satu hutang yang terhutang daripada defendan. Adalah tersangat jelas bahawa plaintif mempunyai satu ekuiti yang lebih baik daripada apa yang ada pada pencelah.

(4) Kemasukan kaveat persendirian tidak semestinya bermakna bahawa pengkaveat mempunyai prioriti terhadap seseorang yang belum lagi memasuki satu kaveat. Kesan satu kaveat bukanlah membesarkan atau menambah kepada hak-hak keempunyaan pengkaveat, sekiranya dia ada.]

Cases referred to

1 *Compania Colombiana de Seguros* v *Pacific Steam Navigation Co* [1965] 1 QB 101 (folld)
2 *Hughes* v *Pump House Hotel Co Ltd* [1902] 2 KB 190 (folld)
3 *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd* [1984] 2 MLJ 268 (folld)
4 *Comfort* v *Betts* [1891] 1 QB 737 (folld)
5 *In re Samuel Allen & Sons Ltd* [1907] 1 Ch 575 (folld)
6 *Lloyd* v *Banks* (1868) LR 3 Ch App 488 (folld)
7 *Reeves* v *Pope* [1914] 2 KB 284 (folld)
8 *Ng Kheng Yeow* v *Chiah Ah Foo & Ors* [1987] 2 MLJ 330 (folld)
9 *Butler* v *Fairclough & Anor* (1917) 23 CLR 78 (folld)
10 *Macon Engineers Sdn Bhd* v *Goh Hooi Ying* [1976] 2 MLJ 53 (folld)

Legislation referred to

Civil Law Act 1956 s 4(3)
National Land Code 1965
Strata Titles Act 1985
Rules of the High Court 1980 O 81
Judicature Act 1873 [UK] s 25(6)
Law of Property Act 1925 [UK] s 136

Chew Sin Far for the plaintiff.
N Chandran for the intervenor.

Cur Adv Vult

Lim Beng Choon J: On 30 April 1987, the plaintiff, the Bank of Tokyo Ltd, applied by way of an originating summons for the following declaratory decree against the defendant, one Mohd Zaini bin Arshad:

> ...a declaration that the plaintiff is entitled to be considered as being the assignees of the premises described as Parcel No 1.4 by virtue of an assignment dated 8 December 1982 and made between the defendant and the plaintiff and further that the plaintiff is entitled to full and entire benefit of the sale agreement dated 3 July 1982 and made between Syarikat Maluri Sdn Bhd and the defendant.

Further and/or in the alternative the plaintiff prayed for:

> An order that the said assignment may be enforced by sale of the said premises to recover the sum of $20,620. 10 due to the plaintiff as at 31 January 1986 with interest accruing thereon at 10% pa on yearly rests from 1 February 1986 to date of payment.

The plaintiff was also asking for ancillary reliefs that the manner of the sale and reserve price and other directions with regard to or effecting the sale be fixed by the senior assistant registrar of the court and that the defendant should deliver to the plaintiff possession of the said premises.

The grounds upon which the plaintiff were relying in support of its application were set out in the affidavit in support affirmed by the general manager of the plaintiff bank and they may be briefly stated as follows. The defendant agreed to purchase the premises described as Parcel No 1.4 ground floor, D Block Taman Maluri 3rd Mile Jalan Cheras, Kuala Lumpur erected on land held under HS(D) 15427 and HS(D) 15428 PT Nos 1643 and 1644, mukim of Ampang (hereinafter referred to as 'the disputed premises') from Syarikat Maluri Sdn Bhd. A sale and purchase agreement to the effect was executed by the two parties on 3 July 1982 (hereinafter referred to as 'the Maluri agreement'). Apparently the defendant applied to the plaintiff for a loan to assist him to purchase the disputed premises. The plaintiff agreed to grant him a loan in the sum of $17,500 provided the defendant agreed to assign the full and entire benefit of the Maluri agreement to the plaintiff together with all the rights, title and interests of the defendant therein. A deed of assignment was duly executed between the plaintiff and the defendant on 8 December 1982. I shall hereinafter refer to this deed of assignment as 'the bank assignment'.

It is useful at this stage to set out the provisions of the bank assignment which are material to this action. By s 1.01(1), the defendant agreed to repay the loan by 240 monthly instalments of $171.30 each. By s 1.01(2) the defendant covenanted to repay to the plaintiff on demand the loan together with interest. As s 2.01 declares the scope of the assignment, it is appropriate to set out the provisions of that section in full and they are as follows:

> For better securing the payment of moneys and liabilities in this agreement contained the borrower beneficial owner hereby assigns to the bank all that the sale agreement and all the benefits thereof and that the estate interest or right whatsoever of the borrower in or to the property thereby contracted to be sold to hold the same unto the bank subject only to redemption upon payment of all moneys and liabilities and interest thereon at the prescribed rate. Provided always that notwithstanding the assignment hereinbefore contained or any other provision of this assignment the borrower shall and hereby undertakes to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrower to be observed and performed contained in the sale agreement.

Section 2.01 is likewise important and should be set out in full. That section reads:

> Contemporaneously with the execution of these presents the borrower shall execute and deliver to the bank a charge under the National Land Code in a form and containing the terms and provisions prescribed by the bank (hereinafter called 'the said charge') with the intent that the said charge shall take effect and operate as a legal charge upon the delivery by the developer of a separate document of subsidiary title the said parcel and a duly executed transfer thereof.

By s 3.01(5) the defendant agreed not to transfer, charge or otherwise howsoever deal with 'the said parcel or any part thereof or any interest of the borrower therein... without the written consent of the bank first had and obtained, such consent to be given or withheld at the absolute discretion of the bank.'

Article V of the bank assignment confers on the plaintiff certain rights and powers should the defendant make default of the matters stipulated therein. By s 5.01 the defendant agreed, inter alia, that in the event that the defendant should:

> (1) make default in payment of any one or more of the instalments or any interest thereon or other sums of money agreed or covenanted by the defendant to be paid or
>
> (2) fail to make payment of the balance of the money owing to the plaintiff bank after the expiration of notice referred to in s 1.05.
>
> then in any such cases the loan and any interest thereon owing under the assignment shall immediately become payable by the defendant to the plaintiff and the plaintiff 'shall forthwith become entitled to recover the same *and to exercise the rights and powers upon default herein this assignment and by law provided without any previous notice to or concurrence on the part of the borrower.*' (Emphasis is mine.)

Then there is s 5.02(1) which confers the right of the plaintiff upon default by the defendant 'to take possession of the said parcel or part thereof'. Additional powers of the plaintiff are stipulated in s 5.02(3) which reads:

> The right and power to sell and assign the said parcel as the *absolute unencumbered* owner thereof at such price or prices and in such manner as the bank shall in its absolute discretion think fit free from any interest of the borrower hereunder or otherwise and to apply the proceeds of sale in or towards the satisfaction of the loan and all principal and interest and other moneys due to the bank under this assignment...' (Emphasis is mine.)

Finally, there is s 5.06 which talks of the defendant's liability to execute a legal charge as soon as there 'shall be issued a subsidiary document of title.'

When the application of the plaintiff came on for hearing on 26 April 1988, this court granted an order in terms of the application in default of appearance and defence on the part of the defendant. The date of the auction sale of the disputed premises was directed to be carried out on 14 October 1988. However, before the auction sale could be carried out, one Maria Pragasam s/o Ignetius Municum ('the intervenor') applied on 10 October 1988 to intervene in the present proceeding together with a plea to defer the auction sale of the dis-

puted premises. In support of his application to intervene, the intervenor filed an affidavit affirmed on the same date (encl 24) in which he averred that on 16 May 1986 an order was made as a consequence of his application made pursuant to O 81 of the Rules of the High Court 1980 ('RHC') for specific performance of a sale and purchase agreement dated 13 December 1984 by which he had lawfully purchased the disputed premises. The O 81 application was made in the course of a writ action instituted by the intervenor in a suit registered as Civil Suit ('CS') F346 of 1984. The intervenor's application to intervene and to stay the auction sale was allowed by this court on 3 June 1989. On 7 July 1989, the intervenor followed up with an application to set aside the order for sale granted by this court to the plaintiff on 26 April 1988. At the hearing of the intervenor's application, the parties concerned agreed that the present proceedings of the plaintiff should be heard together with the intervenor's application made on 25 May 1989 in CS F346 of 1984 in which he is requesting for an order that the senior assistant registrar of this court be allowed to cause a transfer of the disputed premises to him and that the transfer be duly registered by the Land Administrator, Wilayah Persekutuan. I therefore directed a bundle of pleadings in respect of CS F346 of 1984 be prepared to facilitate reference to it before the hearing of the intervenor's application to set aside the order dated 26 April 1988 granting sale of the disputed premises by the plaintiff. From the said bundle of pleadings, the events which led to the intervenor's institution of CS F346 of 1984 and the interlocutory proceedings emanating therefrom can be discerned and be briefly stated as follows:

On 17 November 1983, the intervenor entered into a sale and purchase agreement ('the intervenor sale and purchase agreement') for the purchase of the disputed premises and the purchase price was $50,000. By a deed of assignment dated the same date executed by Mohd Zaini bin Arshad, the defendant in this proceeding through his attorney, one Mohd Nazar bin Kasah, who had been duly appointed under a power of attorney dated 16 November 1982 had assigned all his rights and interest under the sale and purchase agreement dated 3 July 1982 (intervenor's assignment) entered into by the defendant and Syarikat Maluri Sdn Bhd to the intervenor. It was further alleged that there was no restriction under that agreement for the defendant to assign his rights and interests thereunder. In the result, the intervenor claimed that he had the legal and beneficial rights in respect of the disputed premises and that he had a caveatable interest on the said premises. Apparently the defendant and donee of the power of attorney failed to effect a legal transfer of the disputed premises to the intervenor — hence he was compelled to file the writ action in CS F346 of 1984. After service of the writ, the defendants in the said civil suit failed to enter an appearance; neither did they put up any defence. The intervenor thereafter applied under O 81 of the RHC for specific performance of the intervenor's sale and purchase agreement dated 13 November 1983. This court granted an order in terms of the intervenor's application made under O 81 on 16 May 1986. The intervenor could not execute the order of the court against the defendants in that suit as presumably they had disappeared from the scene. On 16 April 1989 the plaintiff in this action applied to intervene in the CS F346 of 1984 proceeding and also to set aside this court's order to transfer the disputed premises to the intervenor. As the intervenor had also entered a caveat on 21 August 1984 in respect of the land on which the disputed premises was erected, the plaintiff also prayed that the caveat be removed. Before the plaintiff's application to intervene in that suit could be heard, the intervenor applied for an order directing the senior assistant registrar to effect the transfer of the disputed premises to him as stated earlier.

At the hearing of the plaintiff's originating summons for the declaratory order and the alternative and ancillary orders mentioned above and the application of the intervenor to set aside the order of court dated 26 April 1988 for sale of the disputed premises, on 10 October 1989, counsel for the plaintiff contended that:

(i) firstly under the power of attorney created by the defendant it was specifically stated that the donee, Mohd Nazar bin Kasah, should pay on behalf of the donor all sums due to the plaintiff bank before the donee could assign or sell the disputed premises to a third party;

(ii) pursuant to the intervenor's agreement with the defendant it was clearly stated in the recitals that a deed of assignment had been entered into between the defendant and the plaintiff whereby the defendant had assigned all his rights, title and interest in the property to the plaintiff. Furthermore under cl 4 the defendant agreed to pay the plaintiff bank such sums of money 'as shall be sufficient to redeem the property.' More importantly it was stipulated in cl 9 thereof that should the defendant fail to pay the amount due to the plaintiff bank the intervenor agreed to settle the same and thereafter recover from the defendant 'as a debt owing by the vendor to the purchaser'. These provisions therefore clearly indicated to the intervenor that the moneys due to the plaintiff must be paid first before the intervenor could claim any right to the property;

(iii) in executing the purported assignment the consent of Syarikat Maluri Sdn Bhd was never obtained when the sale and purchase agreement entered into by the Syarikat and the defendant restricted such an assignment without consent of the Syarikat (see

cl 5.07 of the deed of assignment). Furthermore the bank assignment likewise forbade such assignment without consent (see s 3.01 of the bank assignment). In the result, so said counsel, the assignment was invalid or ineffective.

Counsel for the defendant, on the other hand, argued that the bank assignment was not an 'absolute assignment'. At the most it was, so said counsel, an equitable assignment. He, however, conceded that the assignment to the intervenor has likewise an equitable assignment. But, so said he, as the intervenor had caveated the land on which the disputed premises was erected and the plaintiff had not done so, the equitable right of the intervenor must be superior to that of the plaintiff.

To my mind the questions that I have been asked to answer are really these: (i) Is the bank assignment an absolute one? and (ii) If the answer to (i) is in the negative, which of the party has the better equity?

In raising the issue that the bank assignment is not an absolute assignment, counsel for the defendant is trying to prevent the plaintiff from relying on the statutory protection of legal or equitable choses in action pursuant to s 4(3) of the Civil Law Act 1956 which reads:

> any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

It is to be noted that an assignment which complies with the statutory provision has the effect of conferring on the assignee the right in the legal chose in action. In other words, the rights of the assignor in respect of the subject matter of the assignment are duly transferred to and vested in the assignee — see *Compania Colombiana de Seguros* v *Pacific Steam Navigation Co*[1] where it was held that the insurer who paid the loss and took assignment of the insured's right could keep all proceeds even if they exceeded the loss.

Now the English counterpart of s 4(3) of our Civil Law Act 1956 is s 25(6) of the English Judicature Act 1873 (now replaced by s 136 of the Law of Property Act 1925). It has been held by the English courts that for an assignment to take effect under the 1873 Act there are four conditions which must be satisfied. For the purposes of the present action I need only consider one of the four conditions since there is no dispute that the remaining three conditions had been complied with. The one condition to be considered is whether the bank assignment is an absolute assignment and not by way of charge only. The judicial definition of 'an absolute assignment' is that there must be an intention on the part of the assignor to pass to the assignee complete control of any debt or money payable to or any legal chose in action of the assignor. In testing whether there is such an intention the whole instrument of assignment must be considered regardless of the phraseology adopted in some particular part of it. Thus in *Hughes* v *Pump House Hotel Co Ltd*[2] (which case was brought to my attention by counsel for the intervenor) Matthews LJ said at pp 193-194:

> In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25, and the action must be brought in the name of the assignee.

This principle has been cited with approval by our then Federal Court in *Nouvau Mont Dor (M) Sdn Bhd* v *Faber Development Sdn Bhd*[3] (which case was again brought to my attention by counsel for the intervenor) where Seah FJ, after citing the principle enunciated in the *Hughes* v *Pump Hotel Co Ltd* case,[2] went on to say at p 270:

> While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within s 25 and the action must be brought in the name of the assignee.

I should point out that the 's 25' referred to by Seah FJ is s 25 of the English Judicature Act 1873 and the issue as determined by the then Federal Court is that, if the assignment is an absolute assignment, the assignor has no right to sue in its own name and the action should be brought by the assignee.

Applying the legal principle enunciated in the two cases cited above, I have no doubt that the bank assignment is an absolute assignment and I say so for these reasons. In the first place, the assignor agreed to assign all his benefits, estate, interest or right whatsoever in the premises in question to the plaintiff. The defendant is holding the same in trust for the plaintiff but only as a bare trustee since he has assigned all his legal rights to the plaintiff — see *Comfort* v *Betts*[4] at pp 740-741. In the second place, the defendant as assignor agreed, pursuant to s 5.02 to allow the plaintiff, in the event of default committed by him under the bank assignment, to take possession of the disputed premises as well as the right and power to sell and assign the same as the 'absolute unencumbered owner thereof.'

The learned defence counsel, however, argued that since s 2.02 of the bank assignment talked of a contemporaneous execution of a charge under the National Land Code 1965 ('NLC') it must follow that the said assignment was not an absolute assignment but an assignment by way of a charge. With regret, I cannot agree with his contention. From my reading of that section, it merely provides an additional safeguard in that the defendant should, apart from the said assignment, also execute a charge under the NLC presumably in escrow. This safeguard is necessary because at the time when the said assignment was made, the defendant had not been granted any registrable title under the Strata Titles Act 1985. The charge in escrow therefore is necessary in the event that upon the grant of a title to the defendant, the assignment would end and be replaced by the charge. This proposition is fortified by s 5.06 entitled 'Execution of Legal Charge' which says that as soon as there be an issue of a subsidiary document of title to the defendant, the bank could then complete and perfect the said charge over the land.

In the ultimate analysis of the bank assignment and upon a careful scrutiny of the said assignment, I am satisfied that the same is an absolute assignment.

However, should I be held wrong in arriving at the aforesaid conclusion, I still need to consider the second question posed earlier, namely, which of the two parties has the better equity? In my search for an answer to this question I must bear in mind that at law, as in equity, the basic rule is that rights and interests primarily rank in order of creation. The doctrine of *qui prior est tempore potior est jure* — he who is earlier in time is stronger in law — will apply where the equities are equal and neither claimant has the legal estate: see *In re Samuel Allen & Sons Ltd.*[5] An important qualification to the basic rule is the doctrine of the purchaser without notice. A subsequent purchaser must have no notice of the earlier equitable interest. From this doctrine, it is clear that a subsequent purchaser is affected by notice of an equity when there is:

(i) actual notice: where the equity is within his own knowledge — see *Lloyd* v *Banks*[6] where it was held that a purchaser could not safely disregard information from any source if it was of such a nature that a reasonable man or man of business would act upon the information;
(ii) constructive notice: where the equity would have come to his own knowledge if proper enquiries had been made and;
(iii) imputed notice: where his agent as such in the course of the transaction had actual or constructive notice of the equity — see *Reeves* v *Pope.*[7]

Now in the present case, the bank assignment was executed on 8 December 1982 while the intervenor's assignment was executed on 17 November 1983 (see p 59 of the bundle of pleadings). There is also no doubt that the intervenor had had actual notice of the bank assignment as manifested in the fifth recital of the intervenor sale and purchase agreement. What is more important is that, under cl 9 of the said agreement, the intervenor covenanted that should the defendant fail to pay to the plaintiff bank 'on or before 31 January 1984 such sums of money as shall be sufficient to redeem the said property pursuant to cl 4 hereof the purchaser (meaning the intervenor) shall settle the same with the bank and thereafter recover the same from the vendor (the defendant) as a debt due and owing by the vendor to the purchaser.' Under such circumstances and bearing in mind the principles enumerated above, it is manifestly clear that the plaintiff, has an equity which, in my opinion, is better than that of the intervenor. In further support of this proposition I need only to cite the following passage of *Snell's Principle of Equity* (28th Ed) p 82:

> Whether the assignment is legal or equitable, the assignee takes subject to equities having priority over the right of the assignee. The assignee of a thing in action cannot acquire a better right than the assignor had, or in other words, the assignee takes the thing in action subject to all the equities affecting it in the hands of the assignor which are in existence before notice is received by the debtor.

The learned counsel for the intervenor, however, argued that the plaintiff had failed to enter a caveat to protect its right while the intervenor had caveated the land on which the building containing the disputed premises was erected on 18 August 1984. In such a situation, so said the learned counsel, priority must be given to the intervenor's assignment. I cannot accept such a proposition. It might well be correct in saying that, in certain circumstances, caveat established priority. But such a proposition merely shifts the onus to the holder of a subsequent equity to show facts which rendered it inequitable for the holder of a prior equity to insist as against him on that priority. An entry of a private caveat does not, therefore, necessarily mean that the caveator has a better priority against another who has not as yet lodged one — see *Ng Kheng Yeow* v *Chiah Ah Foo & Ors*[8] at p 331. An Australian case of *Butler* v *Fairclough & Anor*[9] sums up the position where it was stated at p 84 that the effect of a caveat 'is not to enlarge or add to the existing proprietory rights *if he has any.*' Similar approach was adopted by our then Federal Court in *Macon Engineers Sdn Bhd* v *Goh Hooi Ying*[10] where Gill CJ (Malaya) said at p 55:

> The entry of the caveat does not make his claim or right either better or worse...

On principle and authority I cannot, therefore, accept the proposition that just because the intervenor had caveated the land in question in 1984 the priority of the

plaintiff should be reduced and be subservient to the equity of the intervenor.

In view of what has been stated above, judgment must be given to the plaintiff and the order of this court dated 26 April 1988 is sustained. On the other hand, the application of the intervenor to stay the auction and to set aside the said order is dismissed with costs.

Plaintiff's application allowed.

Solicitors: *PG Lim & Co; Adnan Sundra & Low.*

Reported by *PS Ranjan*

Public Bank Bhd v Metro Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 31-699-86
LIM BENG CHOON J
13 FEBRUARY 1990

Agency — Directors of company — Transactions undertaken by directors — Fraud committed by directors against members of company — Whether directors had authority to undertake transactions — Actual authority — Ostensible authority

Companies and Corporations — Memorandum of association — Objects clauses — Construction — Principles applicable

Companies and Corporations — Ultra vires — Companies — Memorandum of association — Directors — Authority — Charges created over property of company — Fraud committed by directors against members — Whether directors had authority to undertake transactions — Whether transactions intra vires memorandum of association of company — Companies Act 1965, s 20(1)

The defendant company had created two charges over some land belonging to it in favour of the plaintiff bank to secure the repayment of two loans given by the plaintiff bank to a company called Tenaga Muhibbah Sdn Bhd ('Tenaga'). The charges were duly registered and following default in repayment of the loan by Tenaga, the plaintiff bank proceeded under the National Land Code 1965 to apply to the court for an order for sale by public auction of the land. One Lee Khai Hong, who claimed to be a director and the major shareholder of the defendant, affirmed and filed an affidavit in the proceedings. In the affidavit, he claimed that two men, one Yeoh Kok Ooi and one Yeoh Seng Lye, under the pretext of acquiring the entire share capital of the defendant company, had tricked him and the other directors of the defendant company into resigning from office and to appoint the two Yeohs as directors in their place. He also said that the two Yeohs had persuaded them to surrender to the two Yeohs the document of title to the land which they did. He also said that without the knowledge of the secretary to the defendant company and its shareholders, the two Yeohs, as directors of the defendant company, then passed a resolution authorizing the defendant company to create the charges as security for credit facilities granted by the plaintiff bank to Tenaga. Lee said that the defendant company had no dealing whatsoever with Tenaga. The two Yeohs had apparently failed to pay for the shares which continued to remain with the vendors.

An order was made for the sale of the land by public auction. Subsequently, the defendant company obtained, on an ex parte application, an order for stay of execution of the order for sale. The plaintiff bank applied for an order to set aside the order for stay.

It was contended for the defendant company that the execution of the charges was ultra vires the defendant company's memorandum of association and that, even if it was intra vires the memorandum, it was ultra vires the powers of the directors as provided in the defendant company's articles of association. It was also contended that as the charges were created not for the benefit of the defendant company but for the benefit of a third party, the creation of the charges was therefore outside the borrowing power of the defendant company as provided in the articles. It was also contended that as the charges were created 'not on account or instruction of the company', the creation of the charges was in breach of the articles. There was no allegation that the plaintiff bank had knowledge at the material time of the fraud committed by the two Yeohs against the shareholders of the defendant company.

Held, dissolving the order granting stay :

(1) A company's objects as stated in its memorandum of association cannot be departed from. An attempted departure is as invalid as if the memorandum were a statute of incorporation; it is ultra vires the company and cannot be validated by assent of a general meeting of the members or by taking judgment against the company by consent or by estoppel.

(2) In the construction of the objects clauses of a memorandum of association, the ordinary rules applicable to the construing of documents apply equally well to the construction of objects clauses. There is no special rule of interpretation by reference to what are supposed to be the main or principal objects of a company where the question is whether something done or proposed to be done is ultra vires.

(3) If a transaction is covered by the objects clauses, a party to the transaction is not bound to inquire as to the company's capacity to enter into it or as to any such limitation on the directors' powers, and the parties will be presumed to have acted in good faith unless the contrary is proved.

(4) In the present case, it could not be gainsaid that the creation of the charges was within the objects clauses of the defendant company.

(5) The fraud committed by the two directors against the shareholders and the excess of authority on the part of the said directors was a matter only between the said directors and the shareholders. More importantly, there was nothing improper or illegal in the transactions. The plaintiff bank had accepted the two charges in good faith and in pursuance of transactions which prima facie were lawful and properly carried out.

(6) The two directors had 'actual' authority to execute the two charges. Even assuming that the 'actual' authority was found wanting it surely could not be said that they did not have, at the material time, an 'apparent' or 'ostensible' authority to execute the charges. Further, where a company had a general power to borrow money for the purposes of its business, a lender was not bound to enquire into the purposes for which the money was intended to be applied.

(7) Even assuming that the charges were ultra vires the defendant's memorandum and articles of association, they could be saved by s 20(1) of the Companies Act 1965.